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No. 80-620

In the
Supreme Court of the United States
OCTOBER TERM, 1980

JOHN J. AYOOB, HUGH IORFIDO, ROSS M. KEEFER, LEWIS E. KIRCHNER, JOSEPH LIBERATI, STEPHEN MIHALIC, ARTHUR L. SCHLEMMER, GEORGE L. SHAFFER, MILTON H. RICHAEL, individually and as District Magistrates in the County of Beaver and their successors in office,
Petitioners,

vs.

PATRICIA MORRISON, BLANCHE LOWE, RACHEL DAWKINS, GEORGE BLACK, and all others similarly situated,
Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Third Circuit

MOTION OF PENNSYLVANIA CONFERENCE OF TRIAL JUDGES FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI AND BRIEF OF PENNSYLVANIA CONFERENCE OF TRIAL JUDGES IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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The Pennsylvania Conference of Trial Judges respectfully moves this court for leave to file the accompanying brief as *amicus curiae.* The consent of the attorney for the petitioner herein has been obtained, but the attorney for

the respondent herein refused to consent to the filing of a brief by the Pennsylvania Conference of Trial Judges as *amicus curiae.*

The Pennsylvania Conference of Trial Judges is an association recognized by the Supreme Court of Pennsylvania as the representative organization for all trial judges in the state, including judges of the Pennsylvania Courts of Common Pleas and the Municipal Court of Philadelphia County. The applicants have an interest in that the decision of the Court of Appeals for the Third Circuit will infringe on the independent performance of their official judicial duties and will subject them to the burden of defending themselves in consequent litigation.

The Petition for a Writ of Certiorari deals with the merits of the decision of the Court of Appeals for the Third Circuit. The Petition is inadequate in that it does not emphasize the necessity for the grant of the Writ. Applicant focuses attention on this issue in its brief.

WHEREFORE, The Pennsylvania Conference of Trial Judges respectfully requests this Court to permit it to file the brief *amicus curiae* which is submitted herewith.

Respectfully submitted,

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STATUTES

42 U.S.C. §1983 (Supp. 1980)

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. §1988 (Supp. 1980)

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherin the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92–318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

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INTEREST OF THE PENNSYLVANIA CONFERENCE OF TRIAL JUDGES

In the instant case the United States Court of Appeals for the Third Circuit held expressly that "judicial immunity is not a factor to be considered" in determining the propriety of an award of attorney's fees under 42 U.S.C. §1988 against judicial officials sued for injunctive and declaratory relief under 42 U.S.C. §1983 for actions taken concededly within the scope of their judicial duties. *Morrison v. Ayoob*, Civil No. 79-1923 (3d Cir., filed July 29, 1980) at 8b.

The court of appeal's decision amounts to a holding that judges are subject to suit under 42 U.S.C. §1983 and may be held liable for attorney's fees under 42 U.S.C. §1988 for errors of law.

The Pennsylvania Conference of Trial Judges is an unincorporated association made up of over 300 judges of the Pennsylvania Courts of Common Pleas and the Municipal Court of Philadelphia County, and is recognized as the official representative organization for the judges of Pennsylvania's courts of original jurisdiction. Its members stand in the front line in administering the Commonwealth's criminal and civil judicial systems, and deal directly with litigants whose dissatisfaction may lead to the filing of civil rights suits. Such suits may especially be feared from the large number of unsuccessful criminal defendants. The possibility of attorney's fee awards may well provide such incentive to litigation that the process of defending nonmeritorious suits will greatly infringe on the ability of the judiciary to carry on its official business in an efficient and expeditious manner. Even the potentiality of

such litigation will impose an extraneous and improper factor into the decision making process of the most conscientiously impartial judge.

For the foregoing reasons the Pennsylvania Conference of Trial Judges wishes to be heard on the issue of the propriety of the grant of the Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

The decision below raises an issue of great importance. In this brief *Amicus* shows that the lower court's holding with respect to jucicial immunity is in direct conflict with decisions of the First Circuit, the Sixth Circuit, and the Ninth Circuit, and that if left undisturbed, it would interferé with the due administration of justice in the state courts.

A. The Decision Below Conflicts with Decisions of Other Circuits

The Third Circuit's decision as to the scope of judicial immunity squarely conflicts with holdings of the First Circuit, the Sixth Circuit, and the Ninth Circuit, although it is lent apparent support by the holdings of the Second Circuit, the Fourth Circuit and the Seventh Circuit. The conflict concerns the propriety of subjecting judges to suits, regardless of the nature of the relief sought, under 42 U.S.C. §1983 for actions taken during the course of their official duties.

In *Stump v. Sparkman*, 435 U.S. 349 (1978) and in *Pierson v. Ray*, 386 U.S. 547 (1967) this Court recognized that the common law defense of judicial immunity applies to actions brought under the Civil Rights Acts. In

both of these cases and in the earlier cases of *Randall v. Brigham*, 74 U.S. (7 Wall.) 523 (1869) and *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335 (1871) the immunity issue arose in the context of suits for damages. In the recent case *Supreme Court of Virginia v. Consumers Union of the United States*, 100 S.Ct. 1967 (1980) (hereinafter cited as *Consumers Union*) this Court expressly reserved decision as to whether judicial immunity would operate as a bar to the granting of declaratory or injunctive relief in a suit brought under 42 U.S.C. §1983. 100 S.Ct. at 1976.

This question, not expressly decided by this Court, has been presented to seven circuit courts of appeal. The results are inconsistent, a fact which this Court acknowledged in *Consumers Union*. 100 S.Ct. at 1976.

In *Heimbach v. Village of Lyons*, 597 F.2d 344 (2d Cir. 1979) suit was brought under 42 U.S.C. §§1983 and 1985 by residents of the Village of Lyons and members of organizations called the "Eastern Farm Workers Association" and "Citizens Committee to Save Water Street" against the Village of Lyons, members of its board of trustees, the village Justice of the Peace, the village Chief of Police, the village Building Inspector, and certain fictitious defendants. The complaint alleged that illegal efforts had been made by the defendants to evict low income people from their homes in certain areas of the village so that the Lyons Village Government could redevelop the area for business and commercial interests. The plaintiffs sought damages and declaratory and injunctive relief.

The district court dismissed the suit against all defendants. It ruled that the village Justice of the Peace was immune from suit since he was not acting in the clear absence of all jurisdiction.

The court of appeals did not disturb the district court's finding that the Justice of the Peace was not acting in the clear absence of all jurisdiction but nevertheless reversed the dismissal of the suit against the justice. The court held that

> while Justice Perry may have acted maliciously in signing a criminal arrest warrant...the justice is nonetheless immune from suit for damages for his actions. *The justice is not immune, however, from suit for injunctive relief and, accordingly, should not be dismissed from this action.* (emphasis supplied) 594 F.2d at 347.

The Fourth Circuit reached a similar result in *Timmerman v. Brown*, 528 F.2d 811 (4th Cir. 1975). State prisoners incarcerated at the Central Correctional Institution at Columbia, South Carolina brought suit under 42 U.S.C. §§1983 and 1985 against various state and county officials seeking damages as well as equitable and declaratory relief. Plaintiffs alleged that defendants were violating their first and fourteenth amendment rights by prosecuting them and by suppressing the prosecution of others.

The district court granted motions to dismiss in favor of the Magistrate and Solicitor for the County of Richland South Carolina. The district court ruled that both defendants were immune from suit since the actions complained of concerned the exercise of their respective judicial and quasi-judicial immunity.

The court of appeals reversed the dismissals. The court held that

> on the basis of judicial immunity, the complaint...should be dismissed to the extent, but

> only to the extent that it seeks the recovery of money damages....*This immunity, however, protects qualified defendants only from claims for money damages. It does not extend to plaintiff's action for injunctive and declaratory relief under Section 1983, 42 U.S.C.* (emphasis supplied) 528 F.2d at 814.

The Seventh Circuit has also held that the doctrine of judicial immunity does not bar a suit seeking prospective relief. In *Hansen v. Ahlgrimm,* 520 F.2d 768 (7th Cir. 1975) a suit had been brought under 42 U.S.C. §1983 by a husband against a duly elected judge of the County Court of Racine County, Wisconsin and his wife's attorney. Plaintiff sought monetary relief as well as declaratory and injunctive relief.

The district court dismissed both the claim for monetary relief and the claim for prospective relief. The circuit court affirmed the dismissal. It agreed with the district court that a judge is immune to suit for damages. The court affirmed the dismissal of the claim for declaratory and injunctive relief on the basis that there no longer existed a live case or controversy, but not before noting:

> It is clear, as a matter of general principle, that declaratory and injunctive relief against a judge are not barred by the existence of judicial immunity from damages under the Civil Rights Act. 520 F.2d at 769.

By contrast, the First Circuit has not drawn a distinction between claims for monetary relief and claims for prospective relief when applying the doctrine of judicial

immunity. In *Guerro v. Mulhearn*, 498 F.2d 1249 (1st Cir. 1974) plaintiff brought a civil rights action under 42 U.S.C. §§1983 and 1985 alleging that certain officials of the Commonwealth of Massachusetts, including a Justice of the Superior court of Massachusetts, violated his constitutional rights by illegally wiretapping his telephone and using evidence obtained thereby at his criminal trial. The complaint sought declaratory relief and also compensatory and punitive damages.

The district court dismissed the action as to the Justice of the Superior Court on grounds of judicial immunity. On motion for summary affirmance under Local Rule 12 the court of appeals affirmed the dismissal. The court did not differentiate between the various claims for relief. As a result of its affirmance neither the claim for damages nor the claim for declaratory relief remained as against the Superior Court Justice. The result can only be explained by concluding that in the First Circuit the doctrine of judicial immunity operates as an absolute bar to suits brought against judges under 42 U.S.C. §1983 regardless of the form of relief sought.

The Ninth Circuit has also held that the doctrine of judicial immunity bars a "suit" against a judge, not simply a form of relief. *Agnew v. Moody*, 330 F.2d 868 (9th Cir. 1964) involved an action under 42 U.S.C. §§1983, 1985 and 1986 against various government officials, including a judge of the Municipal Court of Los Angeles. The dispute arose out of the arrest and conviction of the plaintiff for violations of the Vehicle Code.

The court of appeals affirmed the district court's dismissal of the complaint as to all defendants. The court held the dismissal of the judge was proper because

> judges...are immune from *suit* under the Civil Rights Act for conduct in the performance of their official duties...."Judges are immune from *suit* arising out of their judicial acts, without regard to the motives with which their judicial acts are performed, and notwithstanding such acts may have been performed in excess of jurisdiction, provided there was not a clear absence of all jurisdiction over the subject matter." (emphasis supplied) 330 F.2d at 869, 870 (citing *Sires v. Cole*, 320 F.2d 877, 879 (9th Cir. 1963)).

The term "suit" clearly encompasses all forms of relief. If a judge is immune from "suit" for judicial acts it logically follows that the form of relief sought in the "suit" is of no importance. If the Ninth Circuit had meant otherwise, it certainly would not have chosen the term "suit" to define the scope of judicial immunity.

The holding of the Sixth Circuit in *Azar v. Conley*, 456 F.2d 1382 (6th Cir. 1972) is in accord with the holdings of the First Circuit and the Ninth Ciruit. In *Azar* an action was brought under 42 U.S.C. §§1983, 1985(3) and 1986 against twenty-seven defendants including two judges of the Municipal Court of Akron, Ohio. Plaintiffs, eight members of the Azar family, alleged that defendants denied them their civil rights by refusing to take any action in the face of active harassment and intimidation of the Azar family by the defendant Conley, an Akron police officer. Plaintiffs sought injunctive relief in addition to damages.

The district court dismissed the complaint on a variety of grounds. As to the two judges of the Municipal Court, the district court held that they were immune

from suits under the Civil Rights Act. The Sixth Circuit affirmed noting that "(t)here is no claim here...that the judges acted 'in absence of all jurisdiction' " 456 F.2d at 1388. The court did not differentiate between the various claims for relief but its holding leaves little doubt that in its opinion judicial immunity does not depend on the type of relief sought. Its affirmance relieved the two judges of the Municipal Court from the necessity of defending against the claim for injunctive relief.

The Third Circuit by its decision below has aligned itself with the Second Circuit, the Fourth Circuit, and the Seventh Circuit. The court below was aware of this Court's decision in *Consumers Union* since that case was cited in its opinion. In *Consumers Union* this Court held that there is nothing in the legislative history of 42 U.S.C. §1988

> to suggest that Congress intended to permit an award of attorney's fees to be premised on acts for which defendants would enjoy absolute...immunity. The House committee report on the Act indicates that Congress intended to permit attorney's fees awards in cases in which prospective relief was properly awarded against defendants who would be immune from damage awards,...but there is no indication that Congress intended to permit an award of attorney's fee to be premised on acts that themselves would be insulated from even prospective relief. 100 S.Ct. at 1978.

In awarding attorney's fees to Respondents the court below was clearly of the opinion that judicial immunity is not a bar to prospective relief under 42 U.S.C. §1983.

The scope of judicial immunity is thus quite different in the seven circuits. In the Third Circuit, the Second Circuit, the Fourth Circuit, and the Seventh Circuit, a judge is immune with respect to a request for damages in a suit brought under 42 U.S.C. §1983 but not with respect to a request for prospective relief. In the First Circuit, the Sixth Circuit, and the Ninth Circuit a judge is absolutely immune from suit under 42 U.S.C. §1983 regardless of the relief sought. Uniform application of 42 U.S.C. §1983 requires that this Court review the Third Circuit's decision and resolve this important issue of judicial immunity.

B. The Issue Presented In This Case Is Of Paramount Importance To The Federal System and Has Not Been Decided By This Court

The costs of allowing actions under 42 U.S.C. §§1983 and 1988 against state judges would be significant. Federal courts would have a say in the allocation of state resources to state judiciaries. States would be forced, directly or indirectly, to provide resources for the defense of judges and for the reimbursement of attorneys fees for successful plaintiffs. States would in addition be required to provide additional judicial resources to compensate for the time lost by their present judges while engaged in defending themselves. The cost in terms of judicial resources cannot be presumed to be insignificant to the federal judiciary as well. This Court may take notice of the extraordinary number of *habeus corpus* petitions filed in federal courts even without the inducement of attorneys fees.

An additional cost to be considered is the abandonment of the advantages afforded by judicial immunity.

This Court has long recognized that judicial immunity is beneficial to a proper administration of the law.

> Controversies involving not merely great pecuniary interests, but the liberty and character of the parties, and consequently exciting the deepest feelings, are being constantly determined in those courts, in which there is great conflict in the evidence and great doubt as to the law which should govern their decision. It is this class of cases which impose upon the judge the severest labor, and often create in his mind a painful sense of responsibility. Yet it is precisely in this class of cases that the losing party feels most keenly the decision against him, and most readily accepts anything but the soundness of the decision in explanation of the action of the judge. *Bradley v. Fisher, supra* at 348.

See also *Pierson v. Ray, supra.*

Whatever benefits may be gained do not justify the foregoing costs. Civil rights actions under 42 U.S.C. §1983 are not available to enjoin ongoing criminal prosecutions except under extraordinary circumstances. *Younger v. Harris,* 401 U.S. 37 (1971). They cannot serve as a substitute for writs of *habeus corpus. Prieser v. Rodriquez,* 411 U.S. 475 (1973). Such actions cannot be used to redress the grievances of those who have suffered past exposure to illegal conduct, since those individuals would lack standing without an allegation of continuing, present adverse effects, *O'Shea v. Littleton,* 414 U.S. 488 (1974). The only instance in which prospective relief would be proper, in the absence of judicial immunity, is when a plaintiff alleges that illegal judicial conduct is accompanied by present adverse effects.

Even though relief is seldom available this Court has recognized that "(f)ew persons sufficiently irritated to institute an action against a judge for his judicial acts would hesitate to ascribe any character to the act which would be essential to the maintenance of the action." *Bradley v. Fisher, supra* at 348. Thus the friction between the federal and state judiciaries, which this Court has been so concerned to prevent in cases such as *Younger v. Harris, supra,* and its progeny may well manifest itself. The federal judiciary, presently overburdened, will find itself in the unenviable position of having to determine the propriety of countless claims filed against state judges.

CONCLUSION

For these reasons a Writ of Certiorari should issue to review the judgment and opinion of United States Court of Appeals for the Third Circuit.

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